ARIZONA OMBUDSMAN — CITIZENS' AIDE

The Public Record

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SPECIAL POINTS OF INTEREST:

- For the four most recent newsletters go to http://www.azleg.gov/ombudsman/reports.asp. For newsletters dating back to July 2008 contact Liz at ehill@azoca.gov.
- Open meeting law and public records law booklets and updates are available on our website under publications.
- Training opportunities posted at http://www.azleg.gov/ombudsman/presentations.asp

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What To Do With All That E-mail?

Confusion over retention of, and access to, e-mail is nothing new. Just like any other written record, e-mail is a public record if it is sent or received in the course of conducting public business. Accordingly, it must be retained and provided upon request pursuant to Arizona's public record laws.

Easy enough, right? Well, retention of e-mail can be tricky. Unlike many other records, e-mail is a mode of transportation and is not in and of itself a record series. Indeed, it is the nature and content of the e-mail that determines what record series it belongs to, which in turn determines how long it must be retained. Although many e-mails are transitory communications without retention value, others which evidence official policies, actions, decisions, or transactions require retention.

E-mail must be managed and made available just like any other public record.

In other words, retention is based upon the content of the e-mail and where that content falls on an approved retention and destruction schedule. The State approved retention and disposition schedules may be found online at http://www.lib.az.us/records/schedules_and_manuals.cfm.

If, for example, an e-mail is sent to a school district requesting the dates for winter break, that would probably fall under "General Correspondence", and would need to be retained according to that particular record series and retention period. If an employee sends an e-mail requesting time off for bereavement leave, that e-mail becomes a "Time and Leave Record" and would need to be retained accordingly.

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Executive Sessions: Legal Advice

Executive sessions are the exception to the general requirement that all meetings of public bodies be open to the public. Sections 38-431.03(A)(1) through (7), provide seven reasons a public body may vote to enter a properly noticed executive session. In our October 2008 newsletter, we covered the nuts and bolts of executive sessions. Now we turn specifically to the third exception: legal advice.

Pursuant to A.R.S. § 38-431.03(A)(3), a public body may hold an executive session for "[d]iscussion or consultation for legal advice with the attorney or attorneys of the public body." This requires that the lawyer assigned to represent the public body be present for the purpose of providing legal advice. Mere

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E-mail...

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E-mails between employees regarding budgets, changes to budgets, etc. all become "Budget Records" and would need to be retained accordingly.

Now, let's bust the two most common myths: 1) It is okay to destroy all email after 30 days and 2) I didn't send my e-mail from a work e-mail account or work computer, so it's not a public record.

First, because e-mails are used to communicate a vast number of subjects and therefore, belong to a vast array of record series, it is impossible to have a single retention period for all e-mail. As discussed above, retention is based on the e-mails content. If your Information Technology (IT) folks automatically delete all email after a certain amount of time (e.g., 30, 60, 90 days), that can certainly lead to problems if the public officials and employees assume that IT is managing their e-mails. If that is the case, officials and employees must be trained to conscientiously move and preserve e-mails that require a longer retention period before IT deletes them. This may be accomplished in different ways: 1) move the e-mails into a subfolder within the e-mail system, 2) save the e-mails as a .pst file on the hard drive, or 3) print and file the e-mails as a paper record.

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Make sure employees and Information Technology folks understand your record retention requirements.

Public Access to E-mail addresses

"E-mail addresses provided to and maintained by government entities are public records."

Just like e-mail, e-mail addresses provided to and maintained by government entities are public records and are not statutorily exempt from public records requirements. Moreover, Arizona State Library, Archives, and Public Records requires that the official record of the e-mail contain the first and last name of all senders and recipients. Accordingly, email addresses as well as the contents of an e-mail are subject to public disclosure unless one of the three exceptions to disclosure applies: confidential by statute, a privacy interest outweighs the public's right to know, or disclosure is detrimental to the best interest of the State.

Bottom line: If private individuals do not want their e-mail address made publicly available in response to a public records request, they should not send electronic mail to government entities or provide government entities with an email address for correspondence. Instead communicate by telephone or in writing, via the United States Postal Service.

Attempt to Preclude Access Dismissed

Superior Court takes an unprecedented look at an attempt to enjoin public record requests.

On April 15, 2010, Yavapai Superior Court Judge David Mackay dismissed the Congress Elementary School District's (District) attempt to enjoin four woman from filing public record requests, filing administrative complaints against the District, or from initiating any further actions against the District, however, the court will hear a claim for declaratory judgment as to Defendant Jean Warren's January 13, 2010 public records request. A few of the court's findings included:

1) Neither Arizona statutes or case law allow for establishing a judicial screening process for multiple or unreasonable public records requests;
2) Defendants' did not harass the District; and
3) Defendants' requests were not a nuisance.

The full text of the ruling may be obtained at http://www.goldwaterinstitute.org/case/4505.

E-mail

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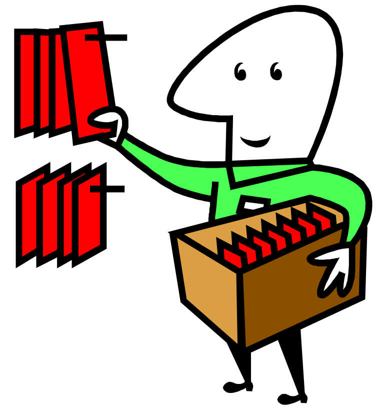
Agencies might consider implementing an agency-wide policy, which centralizes e-mail management or predetermines how employees are to manage e-mail.

Of course, if public officials and employees print and file e-mail like other paper records, the paper print out is still an e-mail and must be provided if it is responsive to a public records request for certain e-mails.

Second, it doesn't matter what computer or email account generated or received the e-mail. It is the content that determines its status as a public record and how long it must be retained. Whether you are using a home computer, personal yahoo account , blackberry, laptop, etc. is irrelevant. If you are conducting public business the e-mail must be retained pursuant to the correct retention schedule and record series and must be provided to the public upon request unless an exception to disclosure applies.

If you have any questions regarding e-mail management, please contact Jerry Kirkpatrick with the Arizona State Library, Archives and Public Records., Records Management Division directly at 602-926-3820 or jkirkpatrick@lib.az.us.



"Any record series listed as permanent on a general retention schedule should be transferred to State Archives…."

Housing Permanent Records

In Arizona, pursuant to the State approved record retention and disposition schedules, you will find that most records have a life cycle and must be destroyed after a certain period of time: It might be three months or ten years. Other records, however, must be maintained permanently. For example, the meeting minutes of multi-member governing boards, commissions, committees, task forces, ad hoc committees, advisory committees, etc. are considered permanent records.

Running out of space? Not to worry. Any record series listed as permanent on a general retention schedule should be transferred to the State Archives when the agency or political subdivision no longer wishes to maintain those records. Not only will they properly house the records, but transferring permanent records to State Archives also relinquishes ownership. At that point, State Archives become the custodian of the records and are responsible for providing them upon request for inspection and copying. Interested? Call State Archives at 602-926-3720 or 800-228-4710 to discuss the transfer of the records.

Legislative Update: 49th Legislature, Second Regular Session

The Arizona Legislature amended A.R.S §§ 39-431.01 and –431.02. The amended statutes require public bodies to post open meeting law materials, disclosure statements, and individual meeting notices online. It also requires persons elected or appointed to a public body to review open meeting law materials at least one day before taking office. The legislation takes effect July 29, 2010. Below are several highlights. For the full text, go to http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/laws/0088.htm.

1. Secretary of State, city and town clerks, and county clerks must conspicuously post open meeting law materials on their website.
2. Public bodies must conspicuously post on their website a statement where all individual meeting notices will be posted (disclosure statement). The statement must include both physical and electronic locations.
3. Public bodies must post all meeting notices on their website unless otherwise provided for by statute.
4. Special Districts formed under Title 48 may post their disclosure statement with the clerk of the board of supervisors.
5. Cities and Towns may post their disclosure statement and meeting notices on a website of an Association of Cities and Towns.

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Dear Readers,

We hope you enjoyed our June issue of The Public Record. Now it's your turn. We want to hear from you.

Do you have first hand knowledge of a public body, public official, or government employee going above and beyond to comply with Arizona's open meeting or public records law? If so, let us know!

We know there are a lot of good things happening out there. Here's an opportunity to recognize positive efforts to open government in Arizona. If you are member of the public, share your experiences and observations. If you are a public body, public official, or government employee, don't be afraid to toot your own horn. Tell us all the great strides Arizona is making to ensure transparency in government. We want to highlight these efforts and unsung heroes in our Fall newsletter.

Contact Liz Hill directly at 602-285-9136 x32 or ehill@azoca.gov.

We're on the web!
www.azoca.gov

Executive Sessions: Legal Advice

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present, without more, is not sufficient. Moreover, once legal advice has been obtained, the public body must return to public session unless the public body voted to enter executive session for other reasons, which were properly noticed and described. Discussion among the members of the public body regarding the merits of the advice given or what action to take in light of the legal advice provided, must take place in public. This includes debate over what action to take as well as the pros and cons or policy implications of competing aletrnative courses of action.

Now let's back up. Before voting to enter into executive session, a public body must make sure the executive session is properly identified on its notice and agenda. First, the notice must state the specific provision of law authorizing the executive session. For example, a public body intending to meet in executive session for purposes of obtaining legal advice must cite A.R.S. § 38-431.03(A)(3). Second, the agenda must contain a general description of the matters to be considered without defeating the purpose of the executive session, compromising the legitimate privacy interests of a public officer, appointee, or employee, or compromising the attorney-client privilege.

Having said that, the Arizona Attorney Generals' Office has previously opined that because many public bodies do not know whether they will have any legal questions on matters on the agenda until the discussion occurs, the notice and agenda may provide a standing statement that matters on the public body agenda may be discussed in executive session for the purpose of obtaining legal advice thereon. For example, the notice and agenda might state, "The Board may vote to hold an executive session for the purpose of obtaining legal advice from the Board's attorney on any matter listed on the agenda pursuant to A.R.S. § 38-431.03(A)(3)." This caveat is limited to A.R.S. § 38-431.03(A)(3), the exception for legal advice.